IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 43

THE TEE-HIT-TON INDIANS, an identifiable group of Alaska Indians, *Petitioner*,

v.

THE UNITED STATES, *Respondent*.

PETITION FOR REHEARING

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Now comes petitioner, by its counsel, and prays for a rehearing.

Rehearing should be granted because this Court's judgment rests upon an opinion which shows on its face complete misconception of the record, studied avoidance of even the slightest consideration of the chief proposition relied upon—and argued *in extenso*—by petitioner, utter ignoring of basic principles established by many decisions of this Court, and similar ignoring of the recognized principles of international law.

This suit was based primarily on a claim of full proprietary ownership in fee simple (R. 2; Pet. Br. 14-36).

Unless and until that claim is decided adversely as a consequence of serious consideration, the opinion's page after page of discussion of the mere incidents of lesser "original Indian title" contributes nothing to a lasting disposition of the problems presented by this and related cases.

Turning to the key paragraph of the opinion at the bottom of page 12 of the advance print, these Indians never urged that it was their stage of civilization and their concept of ownership that took them out of the rule of "original Indian title." It was suggested only as "preliminary considerations" hat those and similar facts might well allay such misgivings on the part of members of this Court as are referred to in the opinion's concluding paragraphs (Pet. Br. 8-13).

When the next sentence to the effect that they assert that Russia never took their lands in the sense that European nations seized the rest of America is compared with the immediately following sentences, and especially with what is not said, the inadequacy and failure of the opinion as an answer thereto cannot be ignored.

What if the Court of Claims "saw no distinction between their use of the land and that of the Indians of the Eastern United States" (fourth sentence)? The nature of that "use" in either instance is wholly immaterial on the question of ownership, unless indeed the instant decision is intended to overrule the great leading cases in this field and thus destroy the whole foundation of the decisions of the past century and a half. If so, this Court owes it to the bar and to the nation to say so directly.

But if not, we submit that this Court cannot ignore its own decisions that even those very Indians of the Eastern United States

> "were considered as **owning** [the lands they occupied] as their **common property**. * * * Indian possession or occupation was considered with reference to their habits and modes of life; their hunting grounds were

> as much in their actual possession as the cleared fields of the whites, and their rights to its exclusive enjoyment in their own way and for their own purposes were as much respected, until they abandoned them: made a cession to the Government; or an authorized sale to individuals." (*Mitchell v. United States*, 9 Peters 711, 745-746, and cases cited in Pet. Br. 15-16.)

There is no pretense of any of those conditions having been satisfied here.

Nor can this Court ignore its unequivocal declaration in the same *Mitchell* case

> "That by the law of nations, the inhabitants, citizens or subjects of a conquered or ceded country, territory or province, **retain all the rights of property which have not been taken from them by the orders of the Conqueror,** or the laws of the sovereign who acquires it by cession, **and remain under their former laws until they shall be changed.**" (9 Peters 711, 734, Pet. Br. 32.)

So much for the law, as it has been declared by this Court. Turning now to its application to the instant record, complete misconception of the evidence is evinced by the statement that the court below "had no evidence that the Russian handling of the Indian land problem differed from ours."* On the contrary, not merely the evidence but also that court's own formal findings of fact are to the directly opposite effect. To briefly summarize those findings, Russia (which did not take over Alaska until the turn of the Nineteenth Century when, as developed in Pet. Br. 24-26, international law no longer considered the bare fact of discovery as a sufficient ground of proprietary right) never extended its administration into the Tee-hit-ton area, and deliberately refrained from claiming on the basis of the right of prior discovery more territory than it could claim by right of first permanent settlement; in the charters of its sole "licensee" it forbade acquisition

* The United States was not a discoverer, and presumably "ours" is intended to refer to our predecessor sovereigns.

in this area even of a trading post except with consent of the Indians; and in 1867 it formally advised the United States that no necessity ever occurred to introduce any system of land ownership (Findings 9-16 at R. 28-30). The British Government on the other hand had from the earliest days of its American colonies asserted title to all the land within those colonies and implemented that assertion by grants of vast areas to great landed proprietors. *Johnson* v. *McIntosh*, 8 Wheat. 543, 574; and cf. John Bassett Moore at Pet. Br. 25.

Wholly irrespective of what Russia may have taken or brought under its administration in the Aleutian Islands or elsewhere in Alaska, the court below expressly found that the Tlingit area here in question was considered as independent. (Finding 12 at R. 28.) And the identically same authority on international law cited to this Court by respondent for a mere generality goes right on in his next paragraph to declare specifically that the actual establishment of a civilized administration is necessary to give a good title. (Pet. Rep. Br. 8.)

Neither Russia nor the United States has by either word or deed ever assumed to conquer one inch of the Tee-hit-ton area here in issue. On the contrary Congress has gone to the very opposite extreme of legislating that Alaska's Indians should not be disturbed in the possession of even the "lands * * * claimed by them." The Acts of 1884 and 1900 dealt with Alaska alone. If this Court is a Court of law and justice—and not a Twentieth Century reincarnation of that same "force" to which it refers on page 17 of the opinion—by what right does it leave the decision of this branch of the case hanging in the air on such a grievously incomplete ruling as that the effect of those statutes was merely to preserve the status quo. All of which means very little unless all the necessary implications of that status quo are developed. It is particularly urged that the majority of the Court should give further consideration to the views expressed by the three dissenting

Justices that the case should be remanded for findings as to what Indian rights were intended to be protected. Or are those statutes now held to have been intended as mere shams?

The cavalier manner in which the opinion disposes of those statutes is irreconcilable with this Court's scholarly and well considered opinion in *Shoshone Tribe* v. *United States*, 299 U.S. 476, 496, 497. There, as has now been held in the instant case, title "was always in the United States", and the Indians had only a "right of occupancy". But in neither instance did that right derive as a matter of law from so called original Indian title. In that case it stemmed from a *treaty* provision for "undisturbed use and occupation of the Shoshone Indians". In the case at bar this branch of the case stems from a *statutory* provision that "the Indians * * * shall not be disturbed in the possession of any lands actually in their use or occupation". In that case this Court unanimously sustained a recovery, and declared that

> "The right of the Indians to the occupancy of the lands pledged to them, may be one of occupancy only, but it is as sacred as that of the United States to the fee".

How can the majority in the present case rationalize their holding such a pledge in an Act of Congress as something less sacred than a pledge using the very same words in an Indian treaty?

And especially so, if we are to understand from page 17 of the opinion that our Nation's highest Court now stigmatizes as a colossal fraud and sham that whole eighty-five year series of 372 Indian treaties which were formally ratified by the Senate and duly published in the Statutes at Large of the United States (Report of Commissioner of Indian Affairs for 1872; 7 Stat., et seq.), and so many of which have been held (as noted at page 5 of the opinion) as constituting "recognition" sufficient to support suits against the United States?

Every member of petitioner group is a citizen of the United States. 43 Stat. 253; 53 I.D. 593. In invoking the processes of this Court they seek—and are entitled to—the same serious consideration and adjudication of the legal rights of the group as this Court accorded the Shoshone Indians in the case just cited. And as it has in similar recognition of its duty and responsibilities accorded to a host of other Indian cases too numerous to name. But this these Indian citizens have been denied in the instant case. It is most respectfully submitted that continuance in that denial after an analysis spelled out as in this petition would inevitably leave its own train of "stultifying implications" even more serious than those so keenly sensed by the District Court in its historic opinion in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 103 F. Supp. 569, 577; judgment affirmed, 343 U.S. 579. For the position chiefly relied upon by petitioner cannot possibly be regarded as frivolous in the legal sense of that term. That is established by instance after instance of its acceptance by respondent's own administrative agencies (Pet. Br. 36-41). And to let stand an opinion which brushes aside such an issue with nothing more than the *ipse dixit* and misstatements of a paragraph such as that at the bottom of page 12 of the opinion would seem unthinkable on the part of a Court dedicated to the cause of justice as between citizens and their sovereign as well as between individuals.

Respectfully submitted,

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Certificate

I certify that the foregoing petition is presented in good faith and not for delay.

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